

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Baxley

Mailed: June 20, 2005

Opposition No. **91155019**

Kevin T. McCarney, d/b/a  
Poquito Mas Inc.

v.

Una Mas, Inc.

**By the Trademark Trial and Appeal Board:**

Una Mas, Inc. ("applicant") seeks to register the mark  
UNA MAS! and design in the following form:

The logo consists of the words "UNA MAS!" written in a very bold, thick, hand-drawn style. The letters are black with some white highlights and shadows, giving it a three-dimensional, graffiti-like appearance. The exclamation point is also large and stylized.

for "Mexican restaurant services" in International Class  
42.<sup>1</sup> Kevin T. McCarney, d/b/a Poquito Mas Inc. ("opposer")  
has opposed registration of applicant's mark on the ground  
of likelihood of confusion with his previously used and

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<sup>1</sup> Application No. 76308904, filed September 6, 2001, based on an  
assertion of use in commerce under Trademark Act Section 1(a), 15  
U.S.C. Section 1051(a), and alleging September 1991 as the date  
of first use and date of first use in commerce. The application  
includes a statement that "[t]he English translation of 'UNA MAS'  
is 'one more.'"

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registered mark POQUITO MAS in typed form also for "restaurant services" in International Class 42.<sup>2</sup>

Opposer's testimony period closed on March 23, 2005. Opposer did not take any testimony or file any evidence during his testimony period.

On April 7, 2005, applicant filed a motion to dismiss for "failure to prove (his) case" under Trademark Rule 2.132(a) or, in the alternative, for summary judgment on an unpleaded affirmative defense of issue preclusion based on the Board's final decision in consolidated Opposition Nos. 91107026 and 91107748, which the Board issued on February 5, 2004 ("applicant's alternative motion").<sup>3</sup>

In response, opposer states that he does not oppose applicant's motion, but does not agree with or acquiesce to the statements, facts, or conclusions made in applicant's

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<sup>2</sup> Registration No. 1892451, issued May 2, 1995 and alleging January 1984 as the date of first use and date of first use in commerce. The registration includes a statement that "[t]he English translation of 'POQUITO MAS' is 'little more.'"

<sup>3</sup> The consolidated proceedings are also styled *Kevin T. McCarney, d/b/a Poquito Mas Inc. v. Una Mas, Inc.* In the Board's decision therein, the Board found that there was no likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), between applicant's marks UNA MAS and ONE IS GOOD, BUT UNA MAS IS BETTER, both in typed form, for "restaurant services" in International Class 42 and opposer's previously used and registered mark POQUITO MAS in typed form, also for "restaurant services" in International Class 42.

The Board notes that such decision was issued during the pendency of this proceeding and after applicant filed its answer herein. However, applicant did not seek leave of the Board to file an amended answer in which applicant pleaded an affirmative defense of issue preclusion.

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brief with regard to its alternative motions. Opposer further contends that the motion for summary judgment is moot.

Turning first to the motion to dismiss for failure to prove case, such motion is actually one to dismiss for failure to prosecute. See Trademark Rule 2.132(a); TBMP Section 534.02 (2d ed. rev. 2004). Such motion is hereby granted as unopposed. See Trademark Rule 2.127(a). Judgment is hereby entered against opposer under Trademark Rule 2.132(a), and the opposition is dismissed with prejudice.

Turning to applicant's motion for summary judgment, the Board notes that, following the issuance of the Board's final decision in consolidated Opposition Nos. 91107026 and 91107748, applicant did not amend its answer to plead an affirmative defense of issue preclusion based on that final decision. Applicant therefore may not obtain summary judgment on that basis.<sup>4</sup> See TBMP Section 528.07(a) (2d ed. rev. 2004). Accordingly, applicant's motion for summary judgment is hereby denied.

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<sup>4</sup> The Board also notes that applicant's motion for summary judgment is untimely because it was filed after the commencement of opposer's testimony period. See Trademark Act Section 2.127(e)(1).